No. 14693

In The

United States

Circuit Court of Appeals

For The Ninth Circuit

MAY W. BENTLEY, RAYMOND L. RUSNAK and JOSEPH HOMAN,

Appellants,

vs.

ROSEBUD COUNTY, MONTANA a body a body corporate,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

Petition For Rehearing

Filed ....., 1956

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STAR PTG. CO.

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PETITION FOR REHEARING

Comes now Russell K. Fillner, County Attorney of Rosebud County, Montana, for and on behalf of the appellee above named, and respectfully petitions this Honorable Court, as constituted in the original hearing hereof, being the Honorable Orr and Lemmon, Circuit Judges, and Harrison, District Judge, for a rehearing of the above entitled cause, and in support of this petition represents to the Court as follows:

1. That this Court erred in its determination of the legal effect of the decision in Milne v. Leiphart 119 Mont. 263, 174 P. 2d 805, discussed on pages 5 and 6 of the Court's printed opinion.

2. The Court did not determine the defense of

laches pleaded by respondent and argued in its brief.

As to the first ground for this motion, it is respectfully submitted that the Milne decision is the law of the State of Montana and has not been overruled expressly or by implication as suggested by the Court by the later decision of Perry v. Maves, 125 Mont. 215, 233 P. 2d 820. This is for the reason that the affidavit in the Milne case was materially different from the affidavit the Court was dealing with in Perry v. Maves case, as this Court well knows. Furthermore, it is not consistent to hold that the Milne case "was overruled sub silentio by the later decision of Perry v. Maves", and at the same time not concede that the Milne case overruled "sub silentio" the cases preceding it.

There has been no contention in this case that the statutes of the State of Montana were not strictly complied with and that the notice referred to in the affidavit was not given for the time prescribed by law. To hold that the affidavit omitting this recitation thereby voids the tax title proceedings as distinguished from rendering them merely voidable, is substituting shadow for substance.

To illustrate, it cannot be questioned that if a summons were issued out of the Court directed to be served on the defendant named therein not less than twenty days before his default, and it was returned by the Sheriff with his indorsement there-

on to the effect that he had personally served a copy of the complaint and summons on the defendant, but failing to state **when** this service was made, none-the-less, any judgment rendered by the Court would not be void for want of jurisdiction, but merely voidable only upon a showing within the time prescribed by the statute that the twenty day period had not elapsed from the date of service to the date of default. Clinton v. Miller, 124 Mont. 463, at page 479, 226 P. 2d 487. Likewise, the recitation in the affidavit filed by the Clerk with the Treasurer of the fact of service of notice in the manner as required by the statute was sufficient proof to confer jurisdiction upon the Treasurer to issue the tax deed, and the defect in the affidavit of failing to state **when** this service was made renders the tax title proceedings voidable only, which must be taken advantage of within the period prescribed by the statute of limitations herein pleaded by the appellee in its answer.

Finally, if it is to be held that the Milne case was in fact overruled, still it is the law of this case, for it is well settled in this state that such overruling is to be given prospective effect only. This was specifically held in the case of Montana Horse Products Co. v. Great Northern Railway Co., 91 Mont. 194, 7 P. 2d 919, and Sunburst Oil & Refining Co. v. Great Northern Railway Co., 91 Mont. 216, 7 P.

2d 927, affirmed on writ of certiorari to U. S. Supreme Court, 287 U. S. 358, 53 S. Ct. 145, 85 A.L.R. 254. Also see Volume XIII, Montana Law Review, pages 74 through 92, and decisions therein cited.

The author of this Law Review article, in commenting upon the Montana decisions in this respect, states on page 89, that it is:

> "firmly established . . . that where statutory or constitutional provisions are construed, any change in construction is to be given prospective effect only. Equally as well settled, and by many of the same cases since the two very frequently intertwine, is the proposition that where property or contract rights have vested, any change affecting them will be given prospective effect only."

and concludes:

> " . . . it would seem that in the interest of doing effective justice the general rule ought to be prospective overruling, with retroactive overruling the exception."

It is respectfully submitted that such ought to be the holding of the Court in this case, inasmuch as valuable property rights have vested in reliance upon the construction of the statutory provisions in the Milne case relating to the sufficiency of the affidavit to be filed with the County Treasurer. It is true that the Milne decision came after the filing of the affidavit in this case, but it is significant that the Milne case confirmed the type affidavit that was filed in this case, thereby precluding the neces-

sity of any affirmative or remedial action by the County. This may be argued that it requires the Court to indulge in a presumption of reliance, which we believe is a safe presumption. However, in any event, it certainly requires no indulgence in any presumption to determine that the County relied on the decision of the Milne case in the instant case.

Therefore, it is respectfully submitted that the Milne case has not been overruled expressly or "sub silentio" by the Maves case; that if said case is held to be overruled, it is by the action of this Court in applying what it finds the state law to be, which overruling can have prospective effect only under the Montana decisions, which are conclusive upon this Court under the doctrine of the Erie Railroad Co. v. Thompkins case.

As to the defense of laches, in addition to the authorities cited on page 34 of our original brief on appeal, we cite the following Montana cases on the subject of laches:

Riley v. Blacker, 51 Mont. 364, 370, 152 Pac. 758

Hynes v. Silver Prince Mining Co., 86 Mont. 10, 281, Pac. 548

Ackey v. Great Western Bldg. & Loan Assn., 110 Mont. 528, 104 P 2d 10.

In our original brief on this subject, we pointed out to the Court that at least one case was pending before the State Supreme Court on the question of

laches. Although this case, Hentzy v. Mandan Loan & Investment Co., 286 P 2d 325, was decided on other grounds, there is a tacit approval of the defense of laches in such case, inasmuch as the trial Court barred the defendants by laches and the Supreme Court affirmed the holding of the trial Court, although without reference to the question of laches. Is this not affirming "sub silentio" the doctrine of laches in such case as this?

In that case the doctrine of laches was interposed by the plaintiff against the defendant, the admitted patent owner of the lands in question, an apparent extension of the doctrine of laches to the point that it is used as a sword for the investiture of legal title, rather than a shield of equitable defense as traditionally applied and as pleaded in this case. Furthermore, in the Hentzy case there was no evidence of an actual increase in value of the land as here by reason of oil and gas development, but merely speculation of increase in value by reason of oil and gas development in the vicinity. Certainly then, if the doctrine of laches was tacitly affirmed in that case, it is respectfully submitted that it should be expressly declared to be a bar in this case.

This petition is made upon the foregoing grounds and on the records, briefs and files herein, and supported by certificate of counsel for appellee attached hereto that in his judgment it is well founded and it is not interposed for delay. Special counsel for Re-

spondent has not joined this petition by reason of his death Dec. 4, 1955.

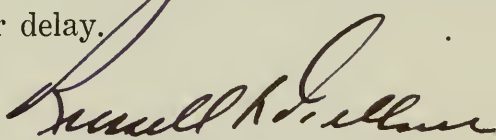
WHEREFORE, your petitioner respectfully petitions and moves the Court for a rehearing of its decision on appeal rendered herein, and that upon such rehearing that this Court vacate its opinion rendered herein and affirm the decision of the lower Court, and for the foregoing reasons.

Respectfully submitted,

RUSSELL K. FILLNER
County Attorney of
Rosebud County
Attorney for Appellee.

CERTIFICATE OF COUNSEL

The undersigned, Russell K. Fillner, County Attorney of Rosebud County, Montana, and attorney for petitioner, hereby certifies that the Petition for Rehearing filed in this case is presented in good faith and that in his judgment it is well founded and is not interposed for delay.



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Rosebud County, Montana,
Attorney for Petitioner.